

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

**BEULAH BRADSHAW,
Complainant,**

and

**SEARS HOLDINGS CORPORATION / K- MART
CORPORATION,
Respondent.**

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) Charge No: 2007CF0955
) EEOC: N/A
) ALS No: 07-784
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RECOMMENDED ORDER AND DECISION

This matter is before me on Respondent's motion for summary decision. Respondent filed its motion along with exhibits and affidavits on October 16, 2008. Complainant filed a document entitled *Complainant's Memorandum Support of its Motion for Summary Decision*, along with exhibits on October 30, 2008, which is being taken and analyzed as Complainant's response to Respondent's motion.

CONTENTIONS OF THE PARTIES

Respondent contends that this matter must be dismissed because the undisputed facts support that Complainant cannot establish a *prima facie* case of race or gender discrimination. Complainant's response is vague and rather rambling; however, it is taken as opposition to the motion.

FINDINGS OF FACT

The following facts were derived from uncontested facts in the record and were not the result of credibility determinations. All evidence was viewed in the light most favorable to Complainant:

1. On October 11, 2006, Complainant filed a *Charge of Discrimination* (Charge) with the Illinois Department of Human Rights (Department), designated as number 2007CF0955. Based on this single Charge, Complainant, on her own behalf, filed

two complaints with the Illinois Human Rights Commission (Commission). Those two complaints were consolidated by order of the Chief Administrative Law Judge on April 24, 2008.

2. Respondent is a retailer of fashionable apparel, accessories, jewelry, toys, home fashions, electronics, sports equipment and garden equipment.
3. Complainant, a black female, began her employment with Respondent on September 10, 1988 as an Associate. Around March, 2000, Complainant became a Loss Prevention Manager and held that position at all relevant times.
4. Timothy Murphy (Murphy) was Store Manager for Respondent and Complainant's direct supervisor from May, 2005 until September, 2006. Jud Miltenberger (Miltenberger) was District Manager for Respondent and Complainant's indirect supervisor at all relevant times. Milan McGraw (McGraw) was Store Manager and Complainant's direct supervisor at the time of Complainant's discharge on October 4, 2006.
5. Complainant alleges that, from around May 1, 2006 through October 4, 2006, she was subjected to harassment based on her race and sex; that, on April 14, 2006, she was placed on probation based on her race and sex; and that, on October 4, 2006, she was discharged based on her race and sex.
6. Complainant alleges that Murphy, her direct supervisor at the time, harassed her when he failed to include her in meetings with the other assistant managers, talked down to her and failed to provide her with help when she requested assistance. Complainant alleges that Miltenberger, her indirect supervisor, harassed her when he called her to work on her off days, yelled at her, talked to down to her and called her illiterate.
7. Murphy and Miltenberger placed Complainant on a Performance Improvement Plan for poor work performance on April 14, 2006.

8. Complainant was discharged on October 4, 2006, by Miltenberger and McGraw.
9. Prior to Complainant's discharge on October 4, 2006, Complainant was the supervisor of Reginald Moore (Moore), a black male employee of Respondent.
10. Moore replaced Complainant as Loss Prevention Manager on November 26, 2006.

CONCLUSIONS OF LAW

1. The Illinois Human Rights Commission has jurisdiction over the parties and subject matter of this Complaint.
2. Respondent is an employer as defined by section 1-101(B)(1)(a) of The Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*, and is subject to the provisions of the Act.
3. Complainant is an aggrieved party as defined by Section 1-103(B) of the Act.
4. The record presents no genuine issues of fact as to Complainant's allegations of race or sex harassment, or as to Complainant's allegations of discrimination based on race or sex.
5. Respondent is entitled to summary decision as a matter of law.

DETERMINATION

This record presents no genuine issues of material fact as to any of the claims alleged in this matter; therefore, Respondent is entitled to summary decision in its favor.

DISCUSSION

This matter is being considered pursuant to Respondent's motion for summary decision. A summary decision is analogous to a summary judgment in the Circuit Court. *Cano v Village of Dolton*, 250 Ill App 3d 130, 620 NE2d 1200 (1st Dist 1993). A motion for summary decision is to be granted when the pleadings, depositions, exhibits and affidavits on file reveal that no genuine issue of material fact exists and establish that the moving party is entitled to judgment as a matter of law. See, Section 5/8-106.1 of the

Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*, and *Young v Lemons*, 266 Ill App 3d 49, 51, 203 Ill Dec 290, 639 NE2d 610 (1st Dist 1994). In determining whether a genuine issue of material fact exists, the record is construed in the light most favorable to the non-moving party, and strictly against the moving party. *Gatlin v Ruder*, 137 Ill 2d 284, 293, 148 Ill Dec 188, 560 NE2d 586 (1990); *Soderlund Brothers, Inc., v Carrier Corp.*, 278 Ill App 3d 606, 614, 215 Ill Dec 251, 663 NE 2d 1 (1st Dist 1995). A summary order is a drastic method of disposing of a case and should be granted only if the right of the moving party is clear and free from doubt. *Loyola Academy v S&S Roof Maintenance, Inc.*, 146 Ill 2d 263, 271, 166 Ill Dec 882, 586 NE2d 1211; *McCullough v Gallaher & Speck*, 254 Ill App 3d 941, 948, 194 Ill Dec 86, 627 NE2d 202 (1st Dist 1993).

Although Complainant is not required to prove her case to defeat the motion, she is required to present some factual basis that would arguably entitle her to a judgment under the law. *Birck v City of Quincy*, 241 Ill App 3d 119, 608 NE2d 920, 181 Ill Dec 669 (4th Dist 1993) citing, *inter alia*, *West v Deere & Co.*, 145 Ill 2d 177, 182, 164 Ill Dec 122, 124, 582 NE2d 685, 687 (1991).

A Complainant bears the burden of proving discrimination by the preponderance of the evidence. Section 5/8A -102 (I) (1) of the Act. That burden may be satisfied by direct evidence that adverse action was taken for impermissible reasons or through indirect evidence in accordance with the method set out in *McDonnell Douglas Corp. v Green*, 411 US 793, 93 S Ct 1817 (1973), and *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 101 S Ct 1089 (1981). This method of proof has been approved by the Illinois Supreme Court and adopted by the Commission in *Zaderaka v Illinois Human Rights Commission*, 131 Ill 2d 172, 545 NE2d 684 (1989).

Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once respondent

successfully makes this articulation, the presumption of unlawful discrimination drops and the complainant is required to prove, by a preponderance of the evidence, that the respondent's articulated reason is a pretext for unlawful discrimination.

Complainant's Complaint attaches and incorporates the *Charge of Discrimination*, filed with the Department. Because the language hand-written on the face of the Complaint is narrative and rambling, the allegations as set out in the *Charge of Discrimination* are the operative allegations for this analysis. Complainant presents six claims of discrimination based on race and sex. This discussion refers to the sex claims by the synonym, *gender*. See Section 5/1-103(O) of the Act.

Prima Facie Hostile Environment Race and Gender Harassment Claims

In Count I, Complainant maintains that she was subjected to illegal harassment based on her race. In Count II, Complainant maintains that she was subjected to illegal harassment based on her gender. These two claims are based on the identical alleged conduct and allow for the combining of the analyses of the *prima facie* cases.

Complainant, a black female, alleges that her Store Manager, Timothy Murphy (Murphy), a white male, harassed her based on her race and gender when he failed to include her in meetings with the other department managers, talked down to her and failed to provide her with help when she requested assistance. Complainant alleges that her District Manager, Jud Miltenberger (Miltenberger), a white male, harassed her based on her race and gender when he called her to work on her off days to correct problems, talked down to her, called her illiterate and yelled and screamed at her.

The Act provides that an employer has a duty to afford all employees equal terms and conditions of employment. Among those terms is that an employee must provide a work environment free of racial harassment, ridicule and disrespect. *Smith and Cook County Sheriff's Office*, IHRC, 107(RRP), Oct 31, 1985; *Ford and Caterpillar, Inc.*, IHRC, 7628(S), Oct 28, 1996.

When an individual is subjected to racial slurs and racial name-calling on a regular basis, it is race harassment, which is a form of race discrimination. Similarly, when a female employee is subjected to name-calling and remarks that disparage her sex on a regular basis, it is sex harassment, which is a form of sex discrimination. *Cline and Consumer Systems*, IHRC, 4944, June 28, 1996.

Harassment has been defined by the Commission as any form of behavior which makes the working environment so hostile and abusive that it constitutes a different term and condition of employment based on a discriminatory factor. *Rennison and Amax Coal Co.*, IHRC, 1237(Y), Mar 21, 1987; *Robinson and Jewel Food Stores*, IHRC, 1533, Dec 22, 1986.

Complainant puts forth no evidence that Murphy or Miltenberger used any race-based or gender-based slurs, epithets or derogatory language. Such language is generally required to establish a direct case of discrimination by showing that the work environment was made hostile or abusive. Complainant's allegations of vague conduct and non-specific language attributed to Murphy and Miltenberger are simply not sufficient to create a genuine issue of fact as to whether the work environment was rendered hostile or abusive on the bases of race or gender.

In the absence of direct evidence, which generally requires a showing of race or gender-based derogatory language or slurs, Complainant must demonstrate a *prima facie* case by showing that (1) she is a member of a protected class, (2) she was treated in a particular manner by Respondent, and (3) similarly situated employees outside her protected class were treated more favorably. *Florida L. Turner-Hiner and Illinois Children's School and Rehabilitation Center*, IHRC, 6170, July 2, 1997; *Moore and Beatrice Food, Co.*, IHRC, 2141, May 12, 1988,

Here, there is no dispute that Complainant, a black female, is a member of the two protected classes: race and gender. The issue is whether a genuine issue of fact exists

as to whether Complainant's superiors treated similarly situated co-workers not in her protected classes more favorably. This question is easily answered as Complainant identifies no such employees, whatsoever. Thus, this record presents no issues of material fact as to whether Complainant was subjected to harassment based on race or gender as to the first two counts of this Complaint.

Prima Facie Case Based on Complainant's Being Placed on Probation Because of Her Race and Gender

Complainant's Count III alleges she was placed on probation on April 14, 2006, and that similarly situated non-black employees who had comparable job performance records were not placed on probation. Complainant's Count IV alleges she was placed on probation on April 14, 2006, and that similarly situated male employees who had comparable job performance records were not placed on probation. These two claims are based on the identical alleged conduct and allow for the combining of the analyses of the *prima facie* cases.

These allegations present claims of unequal terms and conditions of employment. Again, for her *prima facie* case here, Complainant has to prove three elements: (1) that she is in a protected class, (2) that she was treated in a particular manner by Respondent, and (3) that similarly situated employees outside of her protect class were treated more favorably. *Moore, supra* and *Florida L. Turner-Hiner, supra*. As indicated in the previous *prima facie* analysis, Complainant's first element is undisputed. Next, Complainant establishes the second element by demonstrating that she was put on probation by being placed on a Performance Improvement Plan in April of 2006. However, Complainant again fails to present evidence to create any issue of fact as to the third element of her *prima facie* case. Complainant presents absolutely no evidence, other than her unsupported assertion, to suggest that any other employees received more favorable treatment. In her response to the motion for summary decision,

Complainant appears to identify Reginald Moore (Moore), a black male, as a comparable employee; however, uncontroverted affidavits in the record establish that Moore was Complainant's subordinate and reported to her at the relevant time period. A subordinate cannot be compared to a complainant to demonstrate the existence of a similarly situated employee who was treated more favorably. *Ansten and Village of Skokie*, IHRC 4034, March 30, 1993. Therefore, any suggestion that Moore was similarly situated to Complainant is rejected and Complainant's *prima facie* case as to Counts III and IV fails.

Prima Facie Case Based on Complainant's Being Discharged Because of her Race and Gender

Complainant's Count V alleges that she was discharged on October 4, 2006, and that similarly-situated non-black employees were treated more favorably in that they had comparable performance records and were not discharged. Complainant's Count VI alleges that she was discharged on October 4, 2006, and that a similarly-situated male employee, Reginald Moore (Moore), had a comparable performance record and was not discharged. These two claims are based on the identical alleged conduct and allow for the combining of the analyses of the *prima facie* cases.

To establish a *prima facie* case of race or gender discrimination in a discharge situation, Complainant would have to establish that (1) she is in a protected class, (2) she was meeting Respondent's reasonable performance expectations, (3) she was discharged, and that (4) similarly situated persons outside her protected class were treated more favorably, in that someone outside her protected class replaced her or that those outside her protected class were retained while she was discharged. *Sheffield and Wilson Sporting Goods, Co.*, IHRC, 4635, May 7, 1993.

As previously stated, the first element is not in dispute. On the second element, the undisputed facts support that Complainant was not meeting Respondent's reasonable

performance expectations as evidenced by Respondent having placed Complainant on a Performance Improvement Plan in April of 2006. Complainant submits nothing to controvert this evidence. Thus, there remain no issues of fact as to the second element of this *prima facie* showing.

Notwithstanding that Complainant fails to create a genuine issue of fact as to the second element of her *prima facie* case on her discharge claims, even if Complainant could, the record shows that she cannot establish sufficient issues of fact as to the fourth element of her *prima facie* case. Specifically, Complainant fails to identify a single non-black employee that was treated more favorably than she in order to demonstrate her claim of race discrimination; and Complainant again identifies Moore as a comparable in support of her gender discrimination claim. As to the gender claim, Complainant argues that Moore was not discharged although he had similar performance deficiencies as she. Not only does Complainant fail to present any evidence whatsoever to demonstrate Moore's alleged performance deficiencies, Complainant submits nothing to controvert sworn assertions by Miltenberger that Complainant supervised Moore and Moore was Complainant's subordinate during the relevant time. As previously discussed, a subordinate cannot be compared to a complainant to demonstrate the existence of a similarly situated employee who was treated more favorably. *Ansten, supra*. The undisputed facts show that Complainant's *prima facie* claims fail as to Counts V and VI.

Complainant's demonstration of pretext

Under Commission precedent, it is possible for a complainant to prevail without establishing a *prima facie* case, if complainant can establish that respondent's articulated reason for its employment decision was pretextual. *Clyde and Caterpillar, Inc., IHRC, 2794, Nov. 13, 1989, aff'd Clyde v Human Rights Commission, 206 Ill App 3d 283, 564 NE 2d 265 (4th Dist 1990)*. Therefore, if Complainant here can raise a genuine issue of fact on the issue of pretext, Respondent's motion must be denied.

Again, Complainant offers nothing to dispute Respondent's articulated reason for discharging her. Respondent presents the affidavits of Complainant's immediate supervisor, Murphy, and her indirect supervisor, Miltenberger, who both aver that they made the decision to put Complainant on a Performance Improvement Plan due to her unsatisfactory work performance. An affidavit from Kenneth Basil, Respondent's Division Loss Prevention Coach, avers that he and Miltenberger made the decision to discharge Complainant in October, 2006 after they determined that her performance had not improved pursuant to the Performance Improvement Plan. Complainant submits no sworn statements or any other evidence to contradict Respondent's averments or to support a suggestion that Respondent's decision was influenced by race or gender animus. As Respondent correctly states, conclusory allegations do not create genuine issues of fact if unsupported by admissible evidence. *Birck, supra*. This record presents no disputed issues of fact as to Respondent's articulated reason for its discharge decision.

RECOMMENDATION

Based on the foregoing, this record presents no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that Respondent's motion for summary decision be granted and that the complaint in this matter be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

May 7, 2009

SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section